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NO. 2417

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Application of JOHN DENNETT, JR., for Writ of Mandamus Directed to the HON. WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona, and Directed to said DISTRICT COURT.

Motion and Petition for Rehearing and for Stay of Mandate

WILLIAM M. SEABURY,
Solicitor for Petitioners,
Fleming Building,
Phoenix, Arizona.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Application of JOHN DENNETT, JR., for Writ of Mandamus Directed to the HON. WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona, and Directed to said DISTRICT COURT.

MOTION AND PETITION FOR REHEARING.

And now within the time prescribed by law comes the petitioner above named and moves this Honorable Court to grant a rehearing and for the alternative relief specified in the petition hereto annexed upon the grounds thereon set forth and for such other relief in the premises as may be proper.

Dated March 8, 1915.

WILLIAM M. SEABURY,
Solcitor for Petitioners,
Fleming Building, Phoenix, Arizona.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Application of JOHN DENNETT, JR., for Writ of Mandamus Directed to the HON. WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona, and Directed to said DISTRICT COURT.

PETITION FOR REHEARING

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE HONORABLE JUDGES THEREOF.

The petition of John Dennett Jr., and others named herein as petitioners, respectfully shows to this Honorable Court and alleges:

Heretofore and on or about February 15, 1915 this learned Court rendered a judgment or decree dismissing the application of your petitioners for a writ of mandamus as heretofore prayed for herein.

And your petitioners respectfully allege that this learned Court erred in dismissing said petition and in denying relief to your petitioners as prayed for in each

and all of the following respects:

(1) The opinion rendered by the learned Court in this case on February 15, 1915 indicates that the denial of your petitioners' application for mandamus is based solely on the decision that the decree of February 27, 1913 is not supported by the pleadings and exceeds the scope and purpose for which the suit was brought, in that the decree fails to foreclose the possible rights of Trust Company stockholders to rescind their exchange of Loan Association stock for Trust Company stock, in consequence of which this learned Court concludes that the decree of February 27, 1913 is void and that it was, therefore, lawfully vacated after the term at which it was entered by the decree of March 12, 1914.

But the decree was not unsupported by the pleadings nor was it beyond the scope of the purpose of the suit and if it had been the decree would not be void but merely erroneous.

It is not disputed that the complainant Clark brought his bill to redress a wrong sustained by his corporation, namely; the deprivation of its property from the Trust Company.

It is not disputed that all stockholders of the Loan Association were similarly situated with respect to the redress of that wrong and that the fruits of the recovery resulting from a restoration of Loan Association assets

was the common property of Loan Association stockholders.

The remedy exercised in the suit so far as restoration of Loan Association assets is concerned was collective in that it necessarily benefited all of the same class, of which the complainant and other non-exchanging stockholders who intervened were representative members.

The purpose of the suit was to distribute to its stockholders Loan Association assets when recovered and this was done, each stockholder voluntarily accepting the amount each had paid into the company in lieu of a distributive share in the assets.

The decree was not dissimilar to the decree approved by the Eighth Circuit Court of Appeals in Jones vs. Mo. Edison Electric Co., 144 Fed. 765, cited with approval by this Court, and again in 199 Fed. 64, and by the Sixth Circuit Court of Appeals in Stebbins vs. Michigan Wheelbarrow & Truck Co., 212 Fed. 19.

The Loan Association had no creditors (R. 28, fol. 86) and all of its non-exchanging stockholders, acquiesced in and accepted the method of distribution adopted by the decree of February 27 and no such stockholder has ever complained of it.

The original bill pleaded no cause of action based on descission of individual stock subscriptions.

It is obvious that none of the exchanging stockholders named in the decree of February 27 relied upon the original bill to support this branch of their case, for they specifically pleaded in their intervening petitions the facts on which they based their right to rescind.

All of these intervenors appeared prior to the first decree claiming that they had once enjoyed a status as Loan Association stockholders but had been induced through the fraud of the companies to surrender this status and become Trust Company stockholders.

These persons sought individualy and not collectively to exercise the remedy of rescission for their own individual benefit. They represented themselves as individuals and no one else, and did not assume to represent any one else until by judicial decree they regained their original status and then with the complainant they represented Loan Association stockholders and not Trust Company stockholders.

These individuals exercised their remedy diligently, before the insolvency of the Trust Company was established and before the rights of its creditors had accrued.

The wrong against which these intervenors sought primary relief *was not a wrong done to either corporation .*

It was a wrong done by both corporations to them as several individuals.

Their right to a status as Loan Association stockholders and their consequent and wholly dependent right to join with the complainant in behalf of the Loan Association stockholders in the recovery of Loan Association assets, rested solely upon proof of the fraud practiced upon them as individuals when they gave up their Loan Association stock and became Trust Company stockholders.

Such rights are not the subject of "foreclosure" in the sense in which this expression is used in connection with this case.

A consideration of the characteristic features of the remedy of rescission demonstrates this to be so.

The rights claimed depend for their existence entirely upon their prompt assertion and their diligent prosecution. There is no duty upon those who assert rights *against* and not in favor of a corporation to seek out the stockholders of a sinking concern to compel them to take notice of their corporation's distress.

Such a doctrine is contrary to a sound public policy and violative of well settled principles of equity.

Instead of any such rights existing, the rigorous duty is imposed upon those who seek to avail themselves of the exercise of the remedy of rescission to assert the right with the utmost promptness, to prosecute it vigorously and not to exercise it at the expense of creditors and others who, by their diligence, have acquired a legal

right or a superior equity which will be impaired by the exercise of that remedy.

Thus, even if all the Trust Company stockholders were similarly deceived with respect to their individual stock subscriptions, the wrong gave rise to an individual and not to a collective remedy.

It was not the purpose of the suit to marshall the assets of the Trust Company or to distribute them to its stockholders.

It follows that the decree was not unsupported by the pleadings nor beyond the scope of the purpose of the suit, but if it were, we respectfully submit the decree would not be void but merely erroneous.

This is not a case in which an indispensable or even a proper party was absent from litigation or not before the Court.

In an action by a minority stockholder of the Loan Association to compel a restoration of that company's property from the Trust Company, the only indispensable parties defendant are the two corporations.

All the Loan Association stockholders were before the Court. The Trust Company stockholders could have no right to individual notice until the distribution of the assets of the Trust Company was begun. The decree of February 27, 1913 did not contemplate or undertake the distribution of Trust Company property as such.

Its object was merely to satisfy the liens created by what decree out of the properties of both companies and to return the surplus remaining to the Trust Company as a going concern.

It is said that the rights of exchanging stockholders were the same as the non-exchanging stockholders; that they were in the same class and as such entitled to notice or to have their right of participation in the Loan Association assets foreclosed. In other words, that the Trust Company stockholders had an interest in common with the Loan Association stockholders who had never exchanged, in consequence of which they had a right to assume that the suit would result in benefit to them whether they intervened therein or not.

But the premise upon which these assumptions rest is erroneous.

The interests of Trust Company stockholders prior to rescission were not in common with those who had not exchanged. They were adverse. If they had been in common, it would have been wholly unnecessary for the exchanging stockholders to seek and obtain the right to rescind their status and to be restored to the status of Loan Association stockholders if they already enjoyed that status.

So likewise such rights were adverse to the Trust Company and its stockholders who did not seek rescission.

When the exchanging intervenors named in the first decree asserted the right of rescission against the Trust Company based on the fraud of that Company, they asserted rights adverse to every stockholder of the Trust Company who had not sought rescission and adverse to the Trust Company itself, because the right to rescind meant the depletion of the Trust Company's assets to the extent of the share of those permitted to change their status from Trust Company to Loan Association stockholders.

But the interest of the Trust Company *was identical with that of its stockholders who did not seek rescission* and no one disputes that the Trust Company resisted the claims of the intervenors named in the first decree to rescind, as vigorously as it could.

Consequently, the exchanging stockholders *were* before the court contesting the right of the intervenors named in the decree to rescind and they were not entitled to individual notice and had no right to assume that the adverse rights of those who sought rescission would or could be exercised for their benefit or protection.

Since it appears that the Trust Company stockholders were not indispensable or even proper parties to the suit, they were not and could not have been entitled to be made parties to that suit or entitled to have any of their alleged rights foreclosed. The indispensable parties defendant were both before the court actively contest-

ing all of the matters litigated, which fact affirmatively appears upon the face of the decree.

Therefore, if, as asserted, the decree did exceed the scope and the purpose of the suit as indicated by the pleadings, the presumption should be indulged that an amendment of the pleadings was made to conform the pleadings to the evidence.

Reynolds vs. Stockton, 140 U. S. 254, 266.

It is the duty of the Court to indulge this presumption to avoid a destruction of property rights and to avoid an impairment of the stability of judicial decrees.

It necessarily results that the decree of February 27, 1913, was not and is not void, from which it follows that the District Court was wholly without power or jurisdiction to vacate that decree after the expiration of the term at which it was granted.

(2) It is further respectfully submitted that the decision here complained of is erroneous in that in effect it permits individuals named in the petition of intervention of July 15, 1913, to exercise the remedy of rescission after the insolvency of the Trust Company after the rights of your petitioners herein have been fixed and settled by the decree of February 27, 1913, and after the rights of creditors of the Trust Company have supervened, all of which rights are injuriously affected by the decision in question and in this connection your

attention to the case of Scott vs. Abbott, 160 Fed. 573, petitioners respectfully beg leave to direct the Court's 580, 582 and Marks vs. Merrill Paper Co., 203 Fed. 16, 19, in which the United States Circuit Court of Appeals for the Eighth Circuit decided that stockholders should not be permitted to exercise the remedy of rescission after the occurance of the events herein specified.

(3) Your petitioners further allege that this learned Court erred in failing to give effect to the order of Circuit Judge Morrow made April 14, 1913, which sustained a demurrer to the petition in intervention dated April 5, 1913.

Your petitioners allege that this decision of Judge Morrow constituted and was the law of the case and as such was binding upon the District Court in the District of Arizona as constituted on March 12, 1914.

And your petitioners respectfully allege that in the event that this learned Court denies their application for rehearing your petitioners desire to apply to the Supreme Court of the United States for a certiorari to review and revise the errors here complained of.

In this connection, your petitioners respectfully allege that in the event rehearing is denied the petitioners will base its application to the Supreme Court of the United States for certiorari upon the authority, among others, of the case of McClellan vs. Carland, 217 U. S. 268 and upon the case of William Cramp Sons vs. Cur-

tis Turbine Co., 228 U. S. 645, and that such application will be based upon the contention that an imperative necessity exists for the issue of the writ of certiorari for the protection of your petitioners' rights herein in that it is the only means of redress which your petitioners have to correct an excess of jurisdiction in the court below in vacating after the term at which it was rendered a valid final decree in equity to the prejudice of your petitioners and also because the vacation of such decree constitutes error of so grave a character involving considerations of such public importance as to cause it to be the duty of the Supreme Court of the United States to review and revise the proceedings by certiorari and also because the decision of this learned Court here complained of presents a conflict of adjudication and decision between this court and the United States Circuit Court of Appeals for the Eighth Circuit as disclosed by the case of Scott vs. Abbott, 160 Fed. 573 and Marks vs. Merrill Paper Co., 203 Fed. 16.

Wherefore, your petitioners respectfully pray for the vacation of the order, judgment or decree dismissing your petitioners' application for mandamus herein and that thereupon a preemptory writ may issue herein as prayed for in your petitioners' petition for mandamus or in the alternative that the issue of the mandate herein may be stayed for a reasonable time after the decision of this motion to enable your petitioners to apply to the Supreme Court of the United States for a certiorari to

bring up to that court the record herein for review and correction.

Your petitioners as in duty bound will ever pray.

WILLIAM M. SEABURY,
Solicitor for Petitioners,
Fleming Block,
Phoenix, Arizona.

CERTIFICATE OF COUNSEL.

As counsel for the petitioners herein, I respectfully certify that in my judgment the grounds and reasons recited in the foregoing petition for rehearing of the above entitled cause and for the other relief prayed for are well founded and I further certify that this petition for rehearing is not interposed for delay.

WILLIAM M. SEABURY,
Solicitor for Petitioners.

Dated March 8, 1915.